APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: SETH E. SICROFF,
Debtor,

STEPHEN C. JETT,
Plaintiff-Appellant,

v.

SETH E. SICROFF,
Defendant-Appellee,

and

OFFICE OF THE UNITED STATES TRUSTEE,
Trustee.

No. 03-15610
D.C. No. CV-02-00975-LKK

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted
May 12, 2004—San Francisco, California

Submission Withdrawn May 27, 2004
Resubmitted February 9, 2005

Filed March 23, 2005

Before: Diarmuid F. O'Scannlain, Eugene E. Siler,* and Michael Daly Hawkins, Circuit Judges.

[*3526] Opinion by Judge O'Scannlain

[*3528] . . .

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a debt was nondischargeable under the Bankruptcy Act as one for willful and malicious injury when it arose out of a published defamatory letter from a graduate student to the Chancellor of the University of California at Davis.

I

Stephen C. Jett and Seth E. Sicroff were, respectively, a tenured professor and a graduate student in the Geography **[*3529]** Department of the University of California at Davis. When the university proposed closing the department, Sicroff sent a letter, dated April 17, 1993, to the Chancellor and Deans of the university, with copies to the California Aggie, Sacramento Bee and Davis Enterprise newspapers, in which he purported to reveal the "real motivation" for closing the department. Sicroff's letter stated, in part, that:

> Despite the substantial improvements that may be credited to Prof. Ives [and his new hires], the old guard of the geography department has plagued you with a continuous barrage of specious complaints about Prof. Ives. In particular, Prof. Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the

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* The Honorable Eugene E. Siler, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

> subject of numerous and well-substantiated charges of unprofessional conduct.
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> Too weak to fire or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle. Shame on you, and shame on us all if we put up with it!

Based largely on the accusations against them contained in this letter, Professors Jett and Bahre filed two suits, which were later consolidated, against Sicroff and several other defendants alleging, among other injuries, slander, libel and intentional infliction of emotional distress. Before trial, the other defendants settled their claims with Jett and Bahre. Sicroff, however, refused to participate in the settlement and threatened to sue Jett and Bahre with malicious prosecution if they dismissed their claims against him.[1]

[*3530] After the partial settlement, the Sacramento County Superior Court referred the remaining claims to binding arbitration before retired Sacramento Superior Court Judge Benjamin A. Diaz, who found that Sicroff had made defamatory statements against Jett and Bahre. On April 23, 1996, the court entered awards for Bahre of $34,500 (including $4,500 of punitive damages) and for Jett of $23,000 (including $3,000 of punitive damages). Sicroff appealed this finding and the awards to the Third District Court of Appeal, which reversed the judgment against him, ruling that the trial court had improperly denied him his right to a jury trial by ordering the matter to binding arbitration over his objection. On remand, the trial court refused to confirm the arbitration-based judgment and its decision was upheld on a second appeal, which the appellate court determined to be frivolous.

While this litigation was ongoing, Sicroff filed for bankruptcy. Jett and Bahre timely filed adversary complaints to

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[1] Despite this threat, Bahre has since dismissed his claim against Sicroff, leaving only Jett's claims against Sicroff to be resolved.

determine dischargeability based upon their then-existing judgments against Sicroff and the bankruptcy court lifted its automatic stay to allow the completion of the state court litigation between the parties. Following a second remand to the state trial court, a settlement conference was conducted, at which Sicroff failed to appear.[2] After the collapse of the settlement conference, the state court trial proceedings were stayed pending resolution of the bankruptcy proceeding that gives rise to this appeal.

On February 28, 2002, the bankruptcy court held a hearing limited to the issue of the dischargeability of Sicroff's debt[3] **[*3531]** to Jett. At the hearing, Sicroff conceded that his conduct was "willful and intentional" but denied that it was "malicious."

In a memorandum order, the bankruptcy court found Sicroff's debt to be dischargeable. In pertinent part, it reasoned that:

> First of all, it is clear from . . . the April 17, 1993 letter, that the primary purpose of Debtor's actions was to protest the closing of the Geography Department at the University of Davis. While there can be no doubt that Debtor intentionally and re-

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[2] At an early point in the course of this litigation—although exactly when is not clear from the record—Sicroff appears to have moved to Nepal, from whence he is unwilling to travel for the purpose of actively participating in his defense.

[3] Although there is not yet a state court judgment against Sicroff arising out of the alleged defamation, we have recognized that the filing of a claim, without reducing it to a judgment, is sufficient to establish a debt for the purpose of a dischargeability determination. *Banks v. Gill Distrib. Ctrs., Inc.* (*In re Banks*), 263 F.3d 862, 868 (9th Cir. 2001) ("The Bankruptcy Code defines the term 'debt' to mean 'liability on a claim,' and 'claim' is defined as a 'right to payment, whether or not such right is reduced to judgment . . . .'") (internal citations omitted); *see also American Law Ctr. PC v. Stanley* (*In re Jastrem*), 253 F.3d 438, 442 (9th Cir. 2001) ("[T]he definition of 'claim' in bankruptcy is exceedingly broad. A 'claim' is a 'right to payment, whether or not such right is reduced to judgment . . . .'").

> peatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the proposal to close the Geography Department.
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> . . . .
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> Secondly, objecting to the closing of the Geography Department and pointing out the perceived misconduct of University officials may be the "just cause and excuse" that would exonerate Debtor's actions. . . . Debtor did not make his statements to spite the Plaintiff, but to support the larger cause, at least in his mind, of unmasking the real reasons the University officials intended to eliminate the Geog- **[*3532]** raphy Department. In that sense, at least, Debtor's actions were not malicious.

Jett filed a timely notice of appeal to the District Court, which affirmed. Jett timely appeals to this court.

II

"[A] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). It is only the "honest but unfortunate" debtor, however, who is entitled to an entirely unencumbered fresh start. *Id.* at 287. Accordingly, the Bankruptcy Code exempts certain debts from discharge. Such exceptions to discharge "should be confined to those plainly expressed," *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)), and should "be strictly construed in order to serve the Bankruptcy Act's purpose of giving debtors a fresh start." *Industrie Aeronautiche v. Kasler (Matter of Kasler)*, 611 F.2d 308, 310 (9th Cir. 1979).

[1] Section 523(a)(6) of the Bankruptcy Code provides one such express limitation: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Jett alleges that Sicroff's defamatory statements constituted a "willful and malicious injury" and that, therefore, the debt to which they give rise should not be discharged.

We turn first to the question of whether any of Sicroff's statements were defamatory and then to the question of [*3533] whether the injury that they caused was "willful and malicious."

A

The injury alleged in this case is Sicroff's defamation of Jett. The bankruptcy court found simply that Sicroff had published untrue statements about Jett. On appeal, the district court noted that the bankruptcy court had failed to distinguish adequately between false assertions of provable fact and statements of opinion and conducted a more thorough review of many of the allegedly defamatory statements. The district court concluded that many of the statements fell outside the realm of potentially defamatory statements but, because it found that Jett was unable to carry his burden of proving that the defamation both willfully injured him and was malicious, the court did not scrutinize the remaining statements and assumed *arguendo* that they were defamatory. We must, therefore, conduct that more probing review ourselves.

[2] In California, libel is defined by statute simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45.

We agree with the district court that certain statements were either simple name-calling or not provable factually.

See Flowers v. Carville, 310 F.3d 1118, 1127 (9th Cir. 2002) ("The law provides no redress for harsh name-calling."). However, this leaves at least some statements that were not evaluated by either the bankruptcy court or the district court for their libelous nature. These statements include Sicroff's allegations, contained in his April 17, 1993 letter, that Professors Jett and Bahre had been "the subject of numerous . . . charges of unprofessional conduct," should have been disciplined for "serious misbehavior," and had brought a "continu- **[*3534]** ous barrage of specious complaints" against the department chair.

Under California law, "it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact." *Kahn v. Bower*, 284 Cal. Rptr. 244, 250 (Cal. Ct. App. 1991). The California courts have explained:

> [I]n ascertaining whether the statement in question is sufficiently communicative of provable falsity or actual fact to subject the defendant to liability, courts will continue to consider the totality of the circumstances .... First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense .... Next, the context in which the statement was made must be considered .... This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.

Id. at 249 (internal quotations and citations omitted).

[3] The bankruptcy court determined that statements in the April 17, 1993 letter regarding "numerous and well-substantiated charges of professional misconduct" were false and Sicroff's counsel did not disagree. The record also shows that Jett had not been disciplined for "serious misbehavior" and that he had not brought a "continuous barrage of specious complaints" against the department chair. Sicroff of-

fered no defense of "privilege" for his statements. Finally, by alleging "professional misconduct," "serious misbehavior" and other unprofessional activity, Sicroff's statements had a tendency to injure Jett in his occupation. For these reasons, we must conclude that Sicroff's statements satisfied the requirements of libel under California law.

[*3535] B

[4] We analyze the willful and malicious prongs of the dischargeability test separately. *See Carillo v. Su (In re Su)*, 290 F.3d 1140, 1146 (9th Cir. 2002) (noting with approval that "in *In re Jercich*, we treated the 'malicious' injury requirement of § 523(a)(6) as separate from the 'willful' requirement"); *see also Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1207-09 (9th Cir. 2001). Under the test, a creditor must demonstrate nondischargeability by a preponderance of the evidence. *Grogan*, 498 U.S. at 291. When applying this standard, "[i]n addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Su*, 290 F.3d at 1146 n.6.

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[5] The bankruptcy court concluded that the facts fell short of proving that Sicroff's acts were either willful or malicious. However, because Sicroff explicitly conceded that his behavior was "willful and intentional" for purposes of the dischargeability hearing, there is no reason to dwell on the "willful" prong. Sicroff offered no evidence that could counterbalance the weight of his concession and the bankruptcy court's contrary determination was clearly erroneous.

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[6] An injury is "malicious," as that term is used in Section 523(a)(6), when it is: "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Jercich*, 238 F.3d at 1209. Within the plain meaning of this definition, it is the

wrongful act that must be committed intentionally rather than the injury itself. *See Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part definition does *not* [*3536] require a showing of .... an intent to injure, but rather it requires only an intentional act which causes injury.").

[7] Because we are persuaded that at least some of Sicroff's statements were libelous, we also conclude that the first two criteria of "malicious injury" are met. A libelous act, by its nature, is self-evidently wrongful and is committed by an intentional act of publication—in this case, by Sicroff's dissemination of his letter. The third criterion—that the action necessarily cause injury—is also met because Sicroff's statements were directed at Jett's professional reputation and, therefore, will necessarily harm him in his occupation. Having satisfied the first three elements of "malicious injury," to prevail, Jett must demonstrate by a preponderance of the evidence that Sicroff published his statements "without just cause and excuse." It was this final criterion that the bankruptcy court found lacking.

a

The "just cause and excuse" element of "malicious injury" presents a mixed question of law and fact, which we review de novo. *Id.* at 791-92.

[8] The bankruptcy court found that Sicroff had "just cause and excuse" to defame plaintiff despite acknowledging that it could find "no cases ... that defined that phrase." We have, however, interpreted that phrase in at least one prior case. In *In re Bammer*, an en banc panel of this court reversed a Bankruptcy Appellate Panel decision that intentional fraud could be undertaken with "just cause and excuse" when the debtor acted "out of compassion for his mother" and no benefit inured to himself. *Id.* at 791. Explaining our reversal, we declared that "[w]e can think of no reason consistent with section 523 ... to permit a standardless, unmeasurable, emotional, and nonlegal concept such as

compassion to negate an identifiably and *legally* wrongful act." *Id.* at 793 (emphasis in original).

[*3537] [9] In the case before us, we similarly must conclude that Sicroff's goal of protesting the Geography Department's closure did not provide just cause or excuse to calumniate Jett's professional reputation.[4] Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name. When the California Aggie first printed his letter on April 22, 1993, it prudently excised the personalized attacks against Jett and Bahre. In response to this edit, Sicroff sent a second letter, which the newspaper reprinted on April 26, 1993, complaining that "[t]he edited version of my letter that you printed April 22 about the geography department . . . did not at all represent the main point of the letter" and inviting "readers [who] would like the full text of the letter [to] please drop me a note at the geography department." This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest. For these reasons, the bankruptcy court erred in its interpretation of the phrase "just cause and excuse" and in its conclusion that Sicroff's defamation was not malicious by virtue of its connection to a larger, legitimate purpose. We hold instead that Sicroff's libelous statements were not made with just cause and excuse and that, as a result, they were malicious.

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[4] In doing so, however, we affirm that the "just cause and excuse" element has survived *Geiger* in the Ninth Circuit. *See In re Jercich*, 238 F.3d at 1209. While at least one other circuit has read *Geiger* to eliminate the element, *see Miller v. J.D. Abrams Inc. (Matter of Miller)*, 156 F.3d 598, 606 (5th Cir. 1998), we disagree with that interpretation, which was based on reasoning that conflates the elements of willfulness and malice in contravention of our clear precedents. Although it may be rare to find a just cause and excuse for defamation, the phrase is hardly without use in other contexts. An assault, for example, may cause a "willful injury" and meet the first three criteria of "malicious," yet be justly excused by self-defense. However, while excuses that are otherwise valid defenses to criminal offenses may well function with similar force under the "malicious" prong of the dischargeability test, such an excuse is not offered here.

[*3538] III

[10] Because we must conclude that Sicroff's libelous statements constituted a willful and malicious injury, his debt to Jett is not dischargeable. The judgment of the district court is

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

SETH E. SICROFF,
Debtor/Appellee,

v.

STEPHEN C. JETT,
Appellant.

NO. CIV. S-02-975 LKK
Bankr. No. 96-35758-C-7
Adv. Proc. No. 97-2277-C
[STAMP: FILED Mar. 5, 2003]

ORDER

Creditor Stephen C. Jett appeals the bankruptcy court's determination that Seth Sicroff's debt was not non-dischargeable under 11 U.S.C. § 523(a)(6). The debt at issue is Sicroff's liability arising out of Jett's state court action for defamation and intentional infliction of emotional distress. Jett, a former professor of geography at U.C. Davis, brought these claims against Sicroff for statements Sicroff published while a U.C. Davis graduate student that were critical of Jett.

[2] I decide the matter on the pleadings and the papers on file therein and after oral argument.

I.
STANDARDS

This court has jurisdiction to hear appeals from the bankruptcy court by virtue of 28 U.S.C. § 158. Such appeals are taken "in the same manner as appeals in civil proceed-

ings generally are taken to the courts of appeals from the district courts ...." 28 U.S.C. § 158(c)(2). Thus, upon review of a bankruptcy court's judgment, order, or decree, the district court should review conclusions of law *de novo*, and findings of fact for clear error. *See Am. Law Ctr. v. Stanley (In re Jastrem)*, 253 F.3d 438, 441 (9th Cir. 2001).

If the bankruptcy court's decision was correct, but was based on the wrong grounds, it should be affirmed "on any ground finding support in the record." *Grzybowski v. Aquaslide 'N Dive Corp. (In re Aquaslide 'N Dive Corp.)*, 85 B.R. 545, 549 n.4 (9th Cir. BAP 1987). The bankruptcy court should not be reversed for harmless error. *See Miller v. Shuman (In re Shuman)*, 81 B.R. 583, 587 (9th Cir. BAP 1987).

The central issue in this appeal is the propriety of the bankruptcy court's determination that Sicroff's conduct was not willfull and malicious within the meaning of the Act. That resolution was one of fact, to be reviewed for clear error. *See Banks v. Gill Distribution Centers, Inc., et al. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001). "A finding is 'clearly [3] erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

II.
ANALYSIS

A. RIPENESS

As an initial matter, I note that, as yet, there is no state court judgment against Sicroff. Nonetheless, the question of dischargeability is ripe. It is established that "the filing of [the underlying] action, without reducing it to judgment, was sufficient to establish a debt" for the purpose of a dischargeability action. *In re Banks*, 263 F.3d 862, 868 (9th Cir. 2001). The Circuit there explained that "[t]he Bankruptcy Code defines the term 'debt' to mean 'liability on a claim,' 11 U.S.C. § 101(12), and 'claim' is defined as a 'right to payment,

whether or not such right is reduced to judgment....' 11 U.S.C. § 101(5)." *Id.* Thus, this matter was properly before the bankruptcy court.

B. DETERMINATION OF DISCHARGEABILITY OF LIABILITY FOR DEFAMATION

Appellant Jett contends that Sicroff willfully and maliciously defamed Jett, such that Sicroff's liability should not be dischargeable in bankruptcy. To determine the question of dischargeability, the bankruptcy court had to first consider whether the statements at issue were defamatory at all, and if **[4]** so, whether they were made willfully and maliciously. I consider these questions in turn.

1. *Defamation*

Although the bankruptcy court found that many of the statements were defamatory, whether or not a statement is defamatory is a legal question that this court reviews *de novo*. Thus, I consider whether, under California law, the conduct that was allegedly willful and malicious constituted defamation at all. *See Bino v. Baily (In re Baily)*, 197 F.3d 997, 1000 (9th Cir. 1999) (bankruptcy court looks to state law to determine if conduct constitutes a state law based tort).[1]

Defamation may be either slander or libel. *See* Cal. Civ. Code § 44. Libel is a "false and unprivileged publication by writing ... which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal Civ. Code § 45. Slander is, in pertinent part:

> [A] false and unprivileged publication, orally uttered ... which:
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> ....

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[1] At oral argument, there was a suggestion that the parties had stipulated that the statements were defamatory. Of course, the parties' stipulation cannot bind this court to an incorrect conclusion of law. *See United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987).

> (3) Tends directly to injure him in respect to his ... profession ... either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his ... profession ... **[5]** that has a natural tendency to lessen its profits ....

Cal. Civ. Code § 46. It is uncontested that the statements at issue in this matter were published. Less clear is whether all of them were defamatory.

First, appellant contends that Sicroff defamed him by stating or implying that appellant was "deadwood," had made "specious complaints," "serious[ly] misbehav[ed]," and was the subject of "well-substantiated charges of unprofessional conduct."[2] *See* April 17, 1993 Letter, Appellant's Excerpts of Record ("AER") Tab 3 at 72. Appellant also contends that Sicroff defamed him by making statements linking the disestablishment of the geography department to "four years of bombardment of complaints" by Jett and another professor, Conrad **[6]** Bahre. *See, e.g.*, September 8, 1994 Letter, AER Tab 3 at 79. Further, appellant argues that Sicroff defamed him by stating that Jett was "unable, despite energetic efforts, to find another department willing

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[2] The letter containing these statements read, in pertinent part:

> You [the chancellor] promised your full support, including six new appointments that would not only turn the department into a world-class center for mountain studies, but also neutralize the resistance of the dead wood that you couldn't dismiss. You reneged on this promise.... [T]he old guard of the geography department has plagued you with a continuous barrage of specious complaints about Prof. Ives. In particular, Professor Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the subject of numerous and well-substantiated charges of unprofessional conduct.
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> Too weak to fire, or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle.

to accept" him, and by stating, in the same letter in which he discussed Jett's settlement with the university, that "the university is an easy mark for legal extortion." *See id.* at 79-80. Finally, appellant contends that Sicroff's statement to his office-mate, a former graduate student at U.C. Davis, that Jett might be a homosexual, had beady eyes, and "looked like he could have murdered people," were defamatory. *See* Stuhr Depo., Tab 3 at 160:20-161:21.

Reviewing *de novo* the legal question of whether or not these statements are defamatory, I note that bankruptcy court failed to consider the distinction between assertions of fact and those of opinion, which do not constitute defamation. *See Kahn v. Bower*, 232 Cal.App.3d 1599, 1607 (1991) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)) (Statements not implying "a provably false factual assertion," do not constitute defamation). Whether a statement is a provably false factual assertion depends on the totality of the circumstances, including the context in which the statement was made and the understanding of the statement's audience. *See id.* In particular:

> where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or [7] hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 601 (1976).[3]

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[3] The Ninth Circuit has concluded that since *Milkovich* rejected a categorical rule that opinions are exempted from defamation law even when they imply facts, the above-quoted language from *Gregory* "can no longer be interpreted to mean that *all* statements made in such settings are automatically exempt from defamation liability." *Rodriguez v. Panayiotou*, 314 F.3d 979, 987 (9th Cir. 2002). Rather, the Circuit cautioned, the court must still look to the context to determine whether a reasonable

Here, the observation that Jett had beady eyes and looked like he could have murdered people is clearly not an assertion that Jett was a murderer, but only an observation about his bearing or appearance. Likewise, the suggestion that Jett was "deadwood" in the geography department is not a provable factual statement, but simply name-calling. *See, e.g., Gregory*, 17 Cal.3d at 601. As for the assertion that Jett was the subject of well-substantiated charges, it was uncontested that Jett was the subject of at least a charge of sexual harassment. *See* Himelfarb Depo., AER Tab 3 at 334:7-16. While the chancellor testified that there were no well-substantiated charges, *id.* at 334:7-18, the quality of substantiation is a matter of opinion, and not a fact that can be proved or disproved. Finally, the implication that Jett's settlement with the university was "legal extortion" was not defamatory. Sicroff did not suggest that the settlement was actual extortion, which would have been untrue, but simply used "legal extortion" as a figure of speech **[8]** to reflect his negative opinion of the settlement. Thus, much of the substance of the complaint is simply not actionable.

Assuming, *arguendo*, that at least some of the statements made by Sicroff were potentially actionable and not constitutionally protected, debt arising from Sicroff's liability would be dischargeable in bankruptcy unless the defamatory statements were made willfully and maliciously. I turn to that issue.

2. *Willfulness and Malice*

Section 523(a)(6) of the Bankruptcy Code provides that a debt "for willful and malicious injury by the debtor to another" is not dischargeable in bankruptcy. A creditor that seeks a determination of nondischargeability on this basis has the burden of proving both willfulness and malice by a preponderance of the evidence. *See Transamerica Com-*

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finder of fact could find the statements "imply a provably false factual assertion." *Id.*

mercial Finance Corp. v. Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991).

The Supreme Court has held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523 (a)(6)." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998). Based on *Geiger*, the Ninth Circuit has concluded (contrary to the conclusion of the *Baldwin* Bankruptcy Appeals Panel, upon which the appellant relies) that the willful injury requirement "articulates only a subjective dimension." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1145 (9th Cir. 2002). In *Su*, the Circuit held that "§ 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict **[9]** injury or when the debtor believes that injury is substantially certain to result from his own conduct."[4] *Id.* at 1145. Of course, the bankruptcy court need not "simply take the debtor's word for his state of mind. In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Id.* at 1146 n.6.

An injury is "malicious" when it is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause and excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001). Where the willfulness prong has been established, "malice may be inferred from the nature of the wrongful act." *Littleton*, 942 F.2d at 554.

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[4] I note for purposes of clarity that in the dischargeability context, the "willful and malicious" inquiry is more stringent than the malice inquiry under the *New York Times* test. Under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), a statement is made with actual malice if it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 726. Where dischargeability is concerned, however, even reckless disregard is not enough to show that the debtor was willful and malicious. *See Geiger, supra.*

In the matter at bar, the bankruptcy court found that, "[w]hile there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the [10] proposal to close the Geography Department." Memorandum Decision at 3:9-14, AER Tab 13. Based on this finding, the bankruptcy court determined that appellee Sicroff did not willfully injure appellant Jett, because in defamation actions, "the willfulness prong of the test requires that 'the speaker knew his statements were false.'" *Id.* at 3:18-20 (footnote omitted) (citing *Industrie Aeronautiche v. Kalser (In re Kalser)*, 611 F.2d 308, 311-312 (9th Cir. 1979). The bankruptcy court also determined that malice was not established because the goal of explaining the causes behind the closure of the Geography Department might constitute "just cause and excuse."

As noted above, whether an actor behaved willfully and maliciously is a question of fact, to be reviewed for clear error. *See Banks v. Gill Distribution Centers, Inc., et al. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001). Appellant first challenges the bankruptcy court's willfulness determination, arguing that the evidence relied upon by the bankruptcy court was inadmissible hearsay. Specifically, in concluding that the evidence tended to show that appellee believed the truth of his assertions, the bankruptcy court cited a letter to a newspaper editor, in which appellee stated that he showed the California Aggie reporter documentary evidence of the truth of his allegations. *See* Memorandum Decision at 3 n. 2, AER Tab 13. While the statements in this letter might be barred as inadmissible hearsay, the bankruptcy court's reference to that statement would be harmless error at best. What appellant fails [11] to come to grips with is that, to satisfy his burden of proving willful injury, appellant had to show by a preponderance of the evidence that Sicroff knew his defamatory statements were false. *See Industrie Aeronautiche v. Kalser (In re Kalser)*, 611 F.2d 308, 310-11 (9th Cir. 1979) ("[w]hen injury is caused by false statements, as here, 'willfulness' denotes that the speaker knew his state-

ments were false"). Appellant did not even attempt to do so. Rather, appellant's position was that he simply had to show willful publication, *see* Jett Trial Brief, AER Tab 8 at 380:25-27, and that subjective belief in truthfulness was not relevant, *see id.* at 366:13-14, and that truth was relevant only as an affirmative defense to the substantive defamation claim. *Id.* at 374:3-4. Given this position, it is not surprising that, as I explain below, the record does not demonstrate that appellee believed or knew that his statements were false.

In all the evidence presented by appellant to the bankruptcy court, there is none, circumstantial or otherwise, that "tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6. Appellant's evidence that Sicroff was glad his letters annoyed appellant, *see* Stuhr Depo., AER Tab 3 at 186:27-187:25, does not suggest that Sicroff did or did not believe his statements were true. A person who has a conflict with another will be just as happy to see what they believe is an unpleasant truth published about that person as an unpleasant falsehood. **[12]** Nor was the bankruptcy court wrong not to admit evidence concerning an alleged arbitration agreement between appellant and Sicroff in the state court action. As the bankruptcy court pointed out, appellant had failed to submit the evidence before trial. *See* Reporter's Transcript, AER Tab 10 at 415:18-24. Furthermore, even if, as appellant contends, his evidence showed that Sicroff perjured himself to convince California's Third District Court of Appeal to twice reject appellant's argument that the arbitration was binding, evidence of this would be relevant, at best, to show Sicroff was a liar. Federal Rule of Evidence 404, however, prohibits evidence of other wrongs "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Nor would such evidence, if admissible, be probative of whether or not Sicroff believed his defamatory statements true.

Of course, it may be that Sicroff knew very well that he was publishing lies. On the other hand, it may be, as appellant's counsel himself suggested, that Sicroff's statements

were "subjective, unsubstantiated, and paranoid surmise, speculation ...." Jett Trial Brief, AER Tab 8 at 379:21-22. Defamation, based on reckless disregard for the truth or falsity of the statements, however, does not satisfy the willfulness requirement. *See Kalser*, 611 F.2d at 311 (explaining that, because a libel judgment against the debtor could have been based on reckless disregard for the truth or falsity of the statements, the willfulness requirement was not met simply by [13] virtue of that judgment).

Appellant acknowledged a number of different subjective motivations that could be attributed to Sicroff's statements, stating:

> ... Sicroff's statements were either malicious lies originating with Sicroff, the result of incorrect and false information provided to him by others (undoubtedly Jack Ives, with whom plaintiffs and other faculty members of the department have had long-standing differences), unsubstantiated "rumors," or the product of Sicroff's own ravings motivated by his hatred of plaintiffs for what Sicroff (falsely) perceives as plaintiffs' personal responsibility for the disestablishment of the geography department.

Jett Trial Brief, AER Tab 8 at 377:21-378:1. Because there is nothing in the record to show that Sicroff more likely than not believed that his statements were false, appellant did not satisfy the preponderance standard, and the bankruptcy court's finding that there was no willful defamation was not clearly erroneous. Further, as appellant did not satisfy the willfulness requirement, any error the bankruptcy court might have made in also finding lack of malice is harmless.

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Appellant argues that the bankruptcy court erred in failing to address his emotional distress claim. Although the bankruptcy court did not specifically refer to the appellant's emotional distress claim, it appears that the dischargeability determination was meant to dispose of the emotional dis-

tress claim along with the defamation claim, as the decision read, "an order will be entered holding that *any* obligation of the Debtor **[14]** to Plaintiff for his false statements is dischargeable." Memorandum Decision, AER Tab 13 at 577:13-15 (emphasis added). Because, under California law, "[a]n emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action," *Leidholdt v. L.F.P. Inc.*, 860, F.2d 890, 893 n.4 (9th Cir. 1988), the bankruptcy court was correct to discharge liability on the emotional distress claim along with that for the defamation claim.[5]

III.
CONCLUSION

Based upon the foregoing, the determination of the bankruptcy court is hereby AFFIRMED.

IT IS SO ORDERED

DATED: March 4, 2003.

/s/

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[5] Even if there were some basis for distinguishing the applicability of this state law principle in the context of bankruptcy dischargeability, this court would nonetheless uphold the dischargeability determination. Nothing in the record that was before the bankruptcy court showed that the alleged distress was caused knowingly, as required for a willfulness finding, rather than recklessly or negligently. Instead, appellant made the same mistake he made with his motion for dischargeability on the defamation claim, believing Sicroff's subjective state of mind was not pertinent. *See* Jett Trial Brief, AER Tab 8 at 371:4-5. In fact, appellant's counsel expressly acknowledged in his trial brief that Sicroff's subjective mental state remained in question, explaining, "The only question for the state-court jury is whether Sicroff intentionally inflicted emotional distress or did so carelessly or recklessly . . . ."

APPENDIX C

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
Sacramento Division

IN RE: SETH E. SICROFF,
Debtor,

CONRAD J. BAHRE AND STEPHEN C. JETT,
Plaintiffs,

vs.

SETH E. SICROFF,
Defendant.

Case No. 96-35758-C-07
Adversary No. 97-2277-C

Date Heard: Feb. 29, 2002
[STAMP: FILED Apr. 23, 2002
Entered on Docket Apr. 24, 2002]

* * * *

MEMORANDUM DECISION

This matter was heard upon Judge Klein's minute order of February 5, 2002 which provided, *inter alia*, that the trial would be limited to the issue of dischargeability, that the alternate direct testimony of Local Rule 9017-1 would be complied with, and that trial briefs were not required, but optional. Preliminarily, the court noted that Plaintiff Conrad J. Bahre had dismissed his complaint against Seth E. **[2]** Sicroff (hereinafter "Debtor") and was therefore not a party to the action. The court also partially granted the motion of Stephen C. Jett (hereinafter, "Plaintiff") to preclude the in-

troduction of any evidence at the hearing by Defendant. That order was made to enforce the provisions of Local Rule 9017-1 because Defendant had not filed and served any declarations or documentary evidence prior to the hearing as required by the Rule. The ruling did not exclude any pleadings filed prior to Judge Klein's minute order, nor any arguments, claims or assertions in opposition to Plaintiff's claim. It also did not relieve Plaintiff from the burden of proving his case.

The declarations of Plaintiff and Professor Richard Cowen were introduced and admitted into evidence without any cross-examination or objections. The court also considered Plaintiff's Exhibits 5-15,[1] inclusive, Exhibit 25, and the relevant portions of the depositions of Ryan D. Stuhr and Harvey Himelfarb.

The 9th Circuit standard for determining whether a particular act results in a "willful and malicious injury" as meant in 11 U.S.C. § 523(a)(6) has been defined as a two prong test; a willful act requiring a specific intent, and maliciousness as an intentional wrongful act necessarily causing injury done without just cause or excuse. *Carrillo v.* **[3]** *Su (In re Su)*, 259 B.R. 909 (9th Cir. BAP 2001), citing *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001). The facts of this case as provided by Plaintiff fall short of proving that the Debtor's acts were either willful or malicious.

First of all, it is clear from Exhibit 6, the April 17, 1993 letter, that the primary purpose of Debtor's actions was to protest the closing of the Geography Department at the University of Davis. While there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that

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[1] Exhibits 1 through 4 were state court pleadings, Exhibits 16, 17, 26, 27, 28, and 29 only involved Professor Bahre, Exhibits 18 through 24, inclusive, were from the arbitration proceeding, and Exhibits 30 and 31 were the depositions of Ryan D. Stuhr and Professor Himmelfarb.

he believed those statements were true[2] and, in his opinion, explained the real cause for the proposal to close the Geography Department.

Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) defined a willful injury as more than a reckless or negligent act, it required a specific intent to injure. In the case of libel, the willfulness prong of the test requires that "the speaker knew his statements were false." *Industrie Aeronautiche v. Kasler (In re Kasler)*, 611 F.2d 308, 311-312, (9th Cir. 1979). Plaintiff has thus failed to establish that Debtor had the specific intent to injure Plaintiff by his statements.

Secondly, objecting to the closing of the Geography **[4]** Department and pointing out the perceived misconduct of University officials may be the "just cause and excuse" that would exonerate Debtor's actions. No cases were found that defined that phrase. In the absence of a definition, it is not unreasonable to look at the circumstances surrounding Debtor's actions to include the subjective reasons for his conduct. Debtor did not make his statements to spite the Plaintiff, but to support the larger cause, at least in his mind, of unmasking the real reasons the University officials intended to eliminate the Geography Department. In that sense, at least, Debtor's actions were not malicious.

For the reasons stated herein and on the record at the hearing of February 29, an order will be entered holding that any obligation of the Debtor to Plaintiff for his false statements is DISCHARGEABLE.

DATED: April 23, 2002.

/s/
DAVID E. RUSSELL
BANKRUPTCY JUDGE

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[2] *See* Exhibit 12, particularly the penultimate paragraph of the first page and the second paragraph of page 2 where Debtor states that he showed the California Aggie reporter documentary evidence of the truth of his allegations.